

Lock-Down to Avoid Lock-Up?

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Whether and to what extent public demonstrations can legitimately be limited in times of a pandemic is a challenge many countries are facing these days. In Israel, however, the COVID-19 crisis is intertwined with an ongoing political crisis. Citizens take to the street against a government which uses the pandemic as an argument to restrict those very protests. With a second lock-down imminent, is freedom of assembly in danger in Israel?

Freedom of Assembly During a Pandemic

Freedom of assembly is a basic right in liberal democracies, and Israel is no exception. However, it is not absolute, and may be limited under certain circumstances, including to protect public safety or public order. Theoretically, the health threats posed by COVID-19 may fall into this category. The scientific question of the actual public health risks posed by open-air demonstrations is not yet settled, though. While preliminary studies, for example, from the United States, indicate that demonstrations are [not a major source](#) of infection, others argue otherwise. The data regarding the estimated risk of infection associated with protests is not yet conclusive.

The second important issue is the concern that health considerations will be abused to curtail political opposition. Some of the demonstrations currently taking place world-wide are protests against COVID-19 related measures imposed by states. In other cases, protests are primarily political in nature, and either not directly related to the pandemic, or the pandemic plays a relatively minor role in them. Freedom of expression and association encompasses, of course, both types of demonstrations. However, the concern of abuse of public-health justifications for restriction of freedom of assembly is elevated with respect to the latter.

Political crisis in Israel

In Israel, the COVID-19 crisis is intertwined with an ongoing political crisis. On March 2nd, 2020 a third round of elections within the course of a year took place. On May 6th, 2020, the Supreme Court rejected petitions against the eligibility of Benjamin Netanyahu to serve as prime minister (PM) and against the unity agreement with the *Kahol-Lavan* party. Following the decision, Israel's 35th government was sworn in on May 17th, 2020 as a "Unity Government", with Netanyahu as prime minister and Benny Gantz, Netanyahu's former contender, in the newly-established role of "alternative prime minister".

However, the establishment of the government hardly ended the political turmoil. According to Israeli law, in the case that the Knesset fails to approve the state budget presented by the government within a hundred days, it will dissolve, and elections will take place. To date, the unity government has failed to agree on a state budget, as discussions between the parties reached a stalemate. The 100-day deadline was recently pushed forward for another 120 days pursuant to a [law enacted](#) on August 24th, 2020. The prospect of elections, however, is still looming.

At the backdrop of the political instability is the prospect trial of Netanyahu, who is indicted for bribery, fraud, and breach of trust. The trial, delayed due to the pandemic, is now [scheduled](#) to start in January. In the interim, Netanyahu and his supporters have launched a vocal attack on the justice system and on law enforcement system, characterizing his indictment as a “[coup d'état](#)” and as an undemocratic attempt to replace an “[elected prime minister](#)”, and [accusing](#) the Attorney General of being biased against him.

Adding to this tension are the upcoming appointments of high-ranking law enforcement officers, including the Police Commissioner, a post that has been vacant since 2018. A [petition](#) arguing that in light of his upcoming trial, Netanyahu should be barred from being involved in such appointments due to conflicts of interests, has recently been filed by the Movement for Quality Government to the Supreme Court. Netanyahu's attorneys stated, in response, that Netanyahu himself will not take part in the appointments of the attorney general, state attorney and police commissioner. However, Minister of Public Security Amir Ohana, who is considered close to Netanyahu and who is in charge of the police, is [expected](#) to nominate a candidate for the role shortly.

What are the demonstrations in Israel about?

The current demonstrations in Israel can be characterized, first and foremost, as political demonstrations against the government and, in particular, against Netanyahu. In April 2020, media outlets worldwide [showed](#) pictures of socially-distant demonstrations taking place in Tel-Aviv. Distance between protestors was marked on the ground, and the protests were [hailed](#) as COVID-19 compliant and “the future of demonstrations”.

However, as the protests gained momentum, their nature changed. Two main arenas of demonstrations now exist. The first includes the “[black flag](#)” protests, which take place on Saturday evenings on main bridges and in junctions over Israel. The second includes the protests in front of the Prime Minister's official residence on Balfour street in Jerusalem, referred to as the “[Balfour protests](#)”, and the smaller protests in front of Netanyahu's personal residence in Caesarea.

The dominant partisan movements behind the demonstrations, including the Black Flags movement and the “[Crime Minister](#)” movement, emphasize the threat to democracy posed by the ongoing rule of Netanyahu and demand Netanyahu's resignation. Other groups have joined the demonstrations, from owners of [small businesses](#) demanding state assistance with COVID-19 damages through

[restauranters](#) protesting against COVID-19 limitations to Ultra-Orthodox Hassidic Jews protesting against the ban on the annual [pilgrimage](#) to Ukraine. Still, the protests are predominantly political, anti-corruption protests directed against Netanyahu. Netanyahu and his allies have characterized them as an orchestrated, funded and illegitimate attempt to replace him. Despite the lack of scientific evidence, Netanyahu's allies have constantly argued that the demonstrations are a "coronavirus infection hub" and pose a threat to public health.

The Legal Framework Governing the Protests

Freedom of expression is one of the first rights [recognized](#) by the Israeli Supreme Court as a basic right. Following the enactment from 1992 of [Basic Law: Human Dignity and Liberty](#), it is also recognized in Israel as a constitutional right encompassed in the right to human dignity.

Freedom of assembly is, of course, an important facet of freedom of expression. Pursuant to long-standing rulings of the Israeli Supreme Court, the right to demonstrate may be limited only if severe infringement of public order or public safety is highly probable. The authority to determine that such danger exists, as well as the authority to prescribe terms and conditions imposed on demonstrations, is generally vested with the police. The police are also vested with the authority to enforce such conditions, taking into account the various rights and interests at stake.

The Supreme Court regularly conducts judicial review of limitations imposed upon demonstrations. Over the course of the years, it delivered a number of important decisions regarding freedom of assembly. Of particular relevance is a [decision](#) delivered in 2017, with respect to anti-corruption demonstrations taking place in front of the Attorney General's residence. The decision determined that, contrary to long-standing practice, demonstrations generally do not require a license.

Notably, the legal restrictions on social gatherings imposed in Israel due to COVID-19, including the new [coronavirus law](#) enacted in July, *exempt* demonstrations from the general prohibitions on gatherings. Thus, COVID-19 has not been used in Israel, to date, as a justification for banning demonstrations. However, limitations and conditions can be imposed to limit gatherings for reasons of public health, so the threat of abuse is not alleviated.

To sum, the legal premise that the right of assembly is constitutionally protected, both in regular times and in times of emergency, such as an epidemic. However, as it is not an absolute right, the legal dispute revolves around the conditions and limitations that can legitimately be imposed upon such right, and the appropriate policy of enforcing them.

Policing of the Protests

As protests are formally legally permitted, the friction between the protestors, law enforcement officers, and the government revolved, for the most part, around the manner in which they are policed. Protestors argue that the police uses [excessive force](#) in the demonstrations in Balfour. In addition, they argue that the police detain protestors and threats them with prosecution for alleged interruption of public order, with no real basis, as a means of intimidation and deterrence. On several instances, protestors were arrested and required to sign a commitment to refrain from returning to Balfour as a condition for release. Some of the protesters who refused to sign such a commitment remained in custody until released by a court.

Others, in particular, members of Netanyahu's *Likud* party, argue that the police are too lenient with the protests. For example, Public Security Minister Amir Ohana has [spoken](#) against the protests several occasions. He [reportedly argued](#) that the police are too "soft" with the protestors, and demanded them to toughen their management of the protests. It has also been reported that Ohana has tied the [nomination](#) for the position of police commissioner to the candidates' willingness to take a harsh stance with regard to the demonstrations.

The Protest Go to Court

On August 19th, 2020, the Supreme Court [rejected](#) a petition filed by residents of the streets neighboring Balfour against the demonstrations. In the case of *Fadida v. the Police*, the petitioners, sixty individuals residing in proximity to the PM's official residence, requested the Court to order the protesters to hold demonstrations at an alternative location or to otherwise limit them, arguing that the demonstrations disrupt their lives in a variety of ways, and put them at risk for coronavirus infection.

The police outlined before the Court the policy under which they manage the demonstrations. They stated that the demonstrations were limited to certain hours and subject to noise restrictions, and that they applied a gradual enforcement policy of these conditions. First, they request protestors to voluntarily comply with restrictions. Then, they warn the protestors, and, in the case that the protesters do not disperse, use force to break up the demonstration. In addition, they arrest those who lead the resistance to the police's orders or that use violence against police officers. Finally, if this does not suffice, they use "additional measures" that were not specified in the petitions.

The court rejected the petitioners' claims, stressing the importance of the freedom of assembly. It determined that there was no room for a ruling by the Court prescribing how the terms and conditions should be enforced, and that this is generally an issue within the prerogative of the law enforcement agencies.

Shortly after the decision was delivered, on August 25th, 2020, the Deputy State Attorney's office published a new directive regarding the prosecution of protestors.

The directive has been in work for a while, but it was published at the time of the Balfour demonstrations.

The directive generally limits the cases in which protestors can be prosecuted to acts that involve violence committed in aggravated circumstances. It directs toleration of temporary interruption of public order, including spontaneous and temporary blocking of roads, and states that individuals will only be prosecuted when there is specific evidence against them. It also states that prosecutorial policy should be equal and universal. Notably, the directive determines that the approval of the State Attorney's office is required for prosecution of protestors, even though usually the police are vested with the authority to prosecute potential offences.

The directive quickly became a source of political controversy, [attacked](#) by members of the Likud party as “encouraging anarchy” and taking part in the “attempt to bring down Netanyahu”. Within the context of the attack on the justice system, it is marked by Netanyahu's supporters as an illegitimate act directed against him.

Freedom of assembly guaranteed – so far

So far, COVID-19 has not been used in Israel as a justification for banning protests. Nevertheless, the ability to impose restrictions on the right of assembly renders the possibility of limiting it though terms and conditions possible. The new directive reflects a policy of scaling-back on prosecution of protestors and is thus a positive development. However, it also raises the concern that different tactics, including health related arguments, will be applied in order to curtail the demonstrations. This concern has not been realized, and demonstrations have been exempted from the list of restrictions imposed as part of Israel's second lock-down, scheduled to begin on September 18th, 2020. Close scrutiny of further restrictions is, however, warranted.

